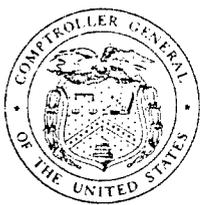


PHM-I

12996

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-197525

DATE: March 3, 1980

PO

MATTER OF: PHC Patrick H. Dunivin, USN

DIGEST: A member of the Navy was separated from his wife when he transferred to Washington, D.C., and she remained in Puerto Rico. The wife obtained a divorce in Puerto Rico in February 1976 but the member did not have knowledge of the divorce until February 1977. Basic Allowance for Quarters (BAQ) at the dependent rate was not terminated until August 1977, resulting in overpayment. BAQ at dependent rate from February 1976 through February 1977 may be waived since member was not at fault due to lack of knowledge of divorce during that period. BAQ at dependent rate paid after February 1977, to August 1977 may not be waived since the member was aware of the divorce and had an obligation to have the payments stopped or set aside for refund. AGC00001

The issue presented upon an [appeal of a waiver denial] by our Claims Division is whether a member of a uniformed service must be considered partially at fault for an overpayment of basic allowance for quarters (BAQ) at the with dependent rate where the member's wife upon whom the with dependent rate was based, obtained a divorce and, due to distance and lack of communication between the spouses, the member did not learn of the divorce until a year later. In the circumstances of this case the answer is no, and the debt is waived in part.

The debt arose due to an erroneous payment of BAQ at the with dependent rate from February 1976 through August 1977 in the total amount of \$3,448.04.

The file indicates that Chief Petty Officer Patrick H. Dunivin, USN, had been receiving BAQ at the with dependent rate while he was stationed in Washington, D.C., but his wife was located in Puerto Rico. Although there had been

111687

~~008816~~

B-197525

some discussion between the member and his wife as early as October 1974 about a divorce, because of a lack of communication between them and the geographic distance separating them Chief Dunivin was apparently not aware that his wife obtained a divorce in Puerto Rico in February 1976. It is claimed that he first became aware of the divorce when a friend who had been in Puerto Rico informed him in February 1977 that his wife had obtained a divorce. Attempts by Chief Dunivin to confirm that his wife had in fact obtained a divorce were not successful until he made a trip to Puerto Rico and obtained a copy of the divorce in June 1977. A change in his status by the unit personnel man was not made until August 1977. The BAQ with dependents was then terminated effective February 14, 1976, the date of the divorce, since as of that date his wife was no longer his dependent for BAQ purposes. 37 U.S.C. 401 and 403 (1976).

By letter dated June 27, 1979, the Claims Division denied the waiver request on the basis that the member had a responsibility to maintain communication with his wife in order to be aware of changes in his marital status and that once he had been advised of his divorce he had a duty to inform the disbursing officer and, if he receives BAQ to which he is not entitled, he has a duty to retain the excess amounts for subsequent refund to the Government. Since Chief Dunivin failed to take these actions, it was determined that he was partially at fault in the matter which precluded waiver.

Subsection 2774(a) of title 10, United States Code (1976), provides in pertinent part that a claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, the collection of which "would be against equity and good conscience and not in the best interest of the United States," may be waived in whole or in part. Subsection 2774(b) further provides that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority to waive any claim:

B-197525

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim \* \* \*"

"Fault," as used in this subsection is considered to exist if it is determined that the member should have known that an error existed but failed to take action to have it corrected. 4 C.F.R. 91.5 (1979). Thus, where a member has some knowledge or suspicion that he may be overpaid, he has a duty and obligation to return the excess sum or set aside the amounts for refund at such time as the error is corrected. B-183460, May 28, 1975, B-188251, May 13, 1977, and B-193020, December 7, 1978.

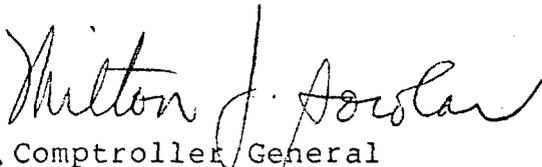
In the present case, it appears that Chief Dunivin made considerable effort to communicate with his wife both before the divorce and after but could get no response. Even after receiving information in February 1977 that his wife had obtained a divorce he was unable to confirm that fact through correspondence with her but had to go to Puerto Rico himself to obtain confirmation and copies of the decree. It also appears that during the period of separation from his wife he continued to make payments upon a mortgage for a house in which she was living in Puerto Rico. To that extent, it could be said that the BAQ he was receiving was going for her support and not solely for his own enrichment. In such circumstances it appears that Chief Dunivin may be considered without fault for the erroneous BAQ paid from February 1976 through February 1977 and there is no indication of fraud or misrepresentation on his part. Therefore that part of the debt consisting of BAQ at the with dependent rate from February 1976 through February 1977 is hereby waived.

With regard to the BAQ at the with dependent rate received after February 1977, since Chief Dunivin had

B-197525

some information from and after that date that he had been divorced he had an obligation and a responsibility of insuring that the money would be returned by either taking action to have the payments stopped or setting aside the money for subsequent refund until the information received by him of the divorce could be confirmed or denied. This he did not do. Therefore, we cannot find that he was without fault concerning those payments. In those circumstances collection action on that part of the BAQ at the with dependent rate paid from March 1977 through August 1977 would not be against equity and good conscience nor contrary to the interest of the United States. Accordingly, denial of waiver of those erroneous payments is sustained.

Chief Dunivin has a right under 10 U.S.C. 2774(c) to apply to the Navy within 2 years of this waiver action for refund of any of the waived amount collected from him or refunded by him.



For the Comptroller General  
of the United States